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American Civil Liberties Union
Testimony at a Hearing on
The Committee Print to Amend the Federal Trademark Dilution Act
Before the
Subcommittee on Courts, the Internet, and Intellectual Property
Of the
Committee on the Judiciary
Of the
House of Representatives

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Chairman Smith, Ranking Member Berman and Members of the Subcommittee:

I am pleased to appear before you today on behalf of the American Civil Liberties Union and its more than 400,000 members, dedicated to preserving the principles of the Constitution and the Bill of Rights, to explain the ACLU's views on the Committee Print to Amend the Federal Trademark Dilution Act. This bill proposes to greatly expand the existing Act, making dilution actions easier for trademark holders while simultaneously diluting protections for free speech. We urge you to continue to require actual dilution in any cause of action, and to make some other amendments that will be more protective of free speech.

Trademark law provides an important tool for preventing confusion or deceptive marketing, but trademark laws should not be used as a pretext to stifle criticism, parody or legitimate competition when there is no reasonable likelihood of confusion and no actual dilution caused by use of the trademark.

This proposed bill is a significant expansion of the current dilution statute, and allows injunctions of speech in more instances. Dilution causes of action are problematic under the First Amendment because they allow commercial entities to secure injunctions prohibiting speech that is truthful and neither misleading or confusing. The basis of the injunction is that someone else other than the trademark holder used a word that is identical or similar to a trademark, and that the use might lessen the consuming public's association of the term with the trademark. Congress initially drafted the Federal Trademark Dilution Act ("FTDA") somewhat narrowly, requiring proof of actual dilution. This lessened the statute's impact on First Amendment activity. The proposed revision, however, adopts a "likelihood of dilution" standard, significantly easing the burden of proving "dilution," and increasing the danger to First Amendment activity.

We will first provide some background on the tension between trademarks and free speech, and then discuss specific problems with the proposed bill.

Background

Trademark law developed primarily to protect the interests of consumers to receive reliable information about goods and services. To accomplish this objective, the suppliers of these goods and services were granted limited rights to regulate the misleading use of their brands and associated symbols. The grant of these rights, however, has the potential to impinge upon the ability of the public to communicate and receive information. Purposeful limitations were therefore placed on the rights of the trademark holder to avoid this problem. One of those limitations was the

doctrine of “confusion”: trademark rights were only enforceable where another’s use is likely to cause confusion.¹ This standard alleviates the tension between the interests of consumers and the broader free speech interest of the public in general.

Courts and commentators have long recognized that trademark liability implicates the First Amendment. “Because the trademark law regulates the use of words, pictures, and other symbols, it can conflict with values protected by the First Amendment. The grant to one person of the exclusive right to use a set of words or symbols in trade can collide with the free speech of others.”² The *Restatement (Third) of Unfair Competition* noted in a comment that the “use of another’s trademark, not as a means of identifying the user’s own goods or services, but as in incident of speech directed at the trademark owner, . . . raises serious free speech concerns.”³

Noting the conflict between trademark law and free speech, the Fourth Circuit Court of Appeals stated in *CPC International, Inc. v. Skippy Incorporated*:⁴

It is important that trademarks not be “transformed from rights against unfair competition to rights to control language.” . . . Such a transformation would diminish our ability to discuss the products or criticize the conduct of companies that may be of widespread public concern and importance. . . .”Much useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company or product by using its trademark.”⁵

Despite free speech concerns, Congress passed the FTDA in 1995 to provide protection from trademark dilution. “Dilution” is defined as the “lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of -- (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake or deception.”⁶

The FTDA provides, in part, that the owner of a famous mark is entitled to relief against another’s commercial use in commerce of a mark, “if such use begins after the mark has become famous and **causes dilution** of the distinctive quality of the mark.” [Emphasis added.] Because of the “causes dilution” language, the Fourth and Fifth Circuits

1 See 2 J. Thomas McCarthy, *McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* §2:32 (explaining that the limited, quasi-property right of trademark holders has extended from tort, rather than property law).

2 1 Pat. L. Fundamentals §4.04 (2d ed.). Some commentators have opined that anti-dilution statutes are inherently antithetical to the First Amendment. See, e.g., Marla J. Kaplan, “Antidilution Statutes and the First Amendment,” 21 *Southwestern University Law Review* 1139 (1992) (arguing that antidilution statutes violate the First Amendment because they prohibit commercial speech that does not mislead or deceive and because there is no substantial government interest to support them; also arguing that antidilution laws are not designed to protect the public, as was trademark law’s historical purpose.)

3 *Restatement (Third) of Unfair Competition* §25 cmt. i (1995). See, also, *ACLU v. Miller*, 977 F.Supp. 1228 (N.D. Ga. 1997) in which the court granted a preliminary injunction against a statute forbidding “any person . . . knowingly to transmit any data through a computer network. . . . if such data uses any. . . . trade name, registered trademark, logo, legal or official seal, or copyrighted symbol which would falsely state or imply that such person has permission or is legally authorized to use [it] for such purpose when such permission or authorization has not been obtained.” The court found this provision overbroad, in that it prohibited speech protected by the First Amendment.

4 *CPC International, Inc. v. Skippy Incorporated*, 214 F.3d 456 (4th Cir. 2000).

5 *Id.* at 462.

6 15 U.S.C. 1127.

required there be actual proof of dilution.⁷ The First, Second, Sixth, and Seventh Circuits, however, adopted a “likelihood of dilution” standard, as they believed actual dilution would be impossible to prove.⁸ The Supreme Court settled the controversy in *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), when it held that the statute required actual proof of dilution.⁹ The proposed bill seeks to overturn *Moseley* by amending the statute to only require “likelihood of dilution.” While this makes it much easier for trademark holders to bring dilution actions, it also significantly decreases protection for activities protected under the First Amendment.

The government interest in protection of trademarks arises when the use of a trademark diminishes its distinctiveness. Trademarks are valuable as identifiers of the source of goods. To the degree this effect is hindered, the public is harmed. The use of a mark to identify the source of a product is central to dilution actions. Consider the example used in the original article in 1927 to justify dilution statutes, and the example used during debates on the FTDA in 1995: the use of the name Kodak on pianos. Where the use of a trademark leads to confusion as to the source of the product, the government may have a “substantial interest” in preventing dilution. After all, slapping the brand name “Kodak” on a piano has little expressive purpose and could lead to consumer confusion.

Where, however, a trademark is used for parody, commentary, or criticism of a product or service, confusion is far less likely, and the government’s interest in protecting a trademark over free speech is minimal. As noted above, empowering trademark owners to quash criticism merely because it involves the use of a trademark transforms the trademark owner into a monitor of the spoken and written English language.

Because the bill would require only a “likelihood of dilution,” instead of actual dilution, trademark holders will be able to stifle speech that is critical of their trademark.

To allow actions for “likelihood of dilution” would broaden dilution to permit injunctive relief against speech that is not confusing or deceptive and has not yet caused harm. Since dilution can occur either by blurring or tarnishment,¹⁰ this broadening would include the “likelihood of tarnishment.” Thus, under the “likelihood of dilution” standard, speech critical of a company could be enjoined, even if true, because it is likely to result in tarnishment.

The idea that trademark owners would use the FTDA to stifle criticism is far from a fanciful notion. It occurred in the Second Circuit, which had interpreted the FTDA to require only a “likelihood of dilution.”

In *WWF v. Bozell*,¹¹ the World Wrestling Federation (WWF) sued individuals for defamation and dilution of the WWF mark. The defendants had embarked on a public relations campaign claiming that the WWF was in part responsible for the deaths of several children killed by teenage wrestling fans who claimed to be mimicking WWF wrestling moves. This speech clearly should have been protected speech under the First Amendment. The court, however, held that the public relations campaign qualified as “commercial use in commerce” as required by section 43(c) of the Lanham Act because defendants attempted to raise money for their cause (“commercial use”) and

7 Ringling Brother-Barnum & Bailey Combines Shows, Inc. v. Utah Division of Travel Development, 170 F.3d 449 (4th Cir. 1999); Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658 (5th Cir. 2000).

8 I.P. Lund Trading ApS, Inc. v. Kohler Co., 163 F.3d 27 (1st Cir. 1998); Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208 (2d Cir. 1999); V Secret Catalogue Inc. v. Moseley, 259 F.3d 464 (6th Cir. 2001); Eli Lilly & Co. v. Natural Answers Inc., 233 F.3d 456 (7th Cir. 2000).

9 The Supreme Court did not reach any issue of constitutionality in the case. It was decided purely on the basis of statutory construction.

10 “Blurring” involves the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon noncompeting goods. “Tarnishment” results when one party uses another’s mark in a manner that tarnishes or appropriates the goodwill and reputation associated with the mark.

11 WWF v. Bozell, 142 F.Supp.2d 514 (SDNY 2001).

posted their statements on the Internet (“in commerce”). Thus, Bozell’s actions did not fit within the exemption for noncommercial use of a mark, and therefore received no protection under the First Amendment. The court rejected defendants’ motion to dismiss. The court also rejected defendants’ claims that the First Amendment required dismissal.

It is important to note that, unlike defamation claims, a dilution claim permits the court to order preliminary injunctive relief. The anti-violence/anti-WWF campaign could be enjoined pending trial in order to protect WWF from the “likelihood” that the campaign would tarnish its mark.

In another case from the Second Circuit, *Scholastic Inc. v. Stouffer*,¹² the author and publisher of the hugely popular Harry Potter books sought a declaratory judgment that it had not infringed on Stouffer’s copyrights or trademarks. Stouffer counterclaimed, alleging, among other things, dilution and defamation. The defamation claim was based on plaintiffs’ alleged portrayal of Stouffer as a “golddigger” whose claims were “absurd,” “ridiculous” and “meritless.”¹³ The court dismissed the claim “to the extent it asserts a claim for defamation, but declines to dismiss this claim to the extent it asserted a claim for dilution under federal or state law.”¹⁴ Therefore, a dilution action was allowed to proceed even though the comments should have been protected as free speech.

By requiring only a “likelihood of dilution,” trademark holders will now have a more potent weapon to stifle speech that is critical or a parody of their trademark. Furthermore, unlike defamation law, under the FTDA a preliminary injunction may be granted, silencing the speaker until after a trial. Thus, on the speculation that a trademark *may* be diluted a speaker may be muzzled. In essence, trademark holders now have a monopoly on certain words, expressions and images.

We urge you to reject the “likelihood of dilution” standard and maintain the “actual dilution” language currently in the FTDA.

Because the bill would make dilution by tarnishment actionable, the bill would stifle free speech.

Specifically recognizing “tarnishment” as a cause of action opens the door to silencing critics of a trademark,

There are two commonly recognized forms of dilution: blurring and tarnishment.¹⁵ “Blurring involves the gradual whittling away or dispersion of the identity and hold upon public mind of the mark or name by its use upon noncompeting goods.”¹⁶ “Tarnishment results when one party uses another’s mark in a manner that tarnishes or appropriates the goodwill and reputation associated with the mark.”¹⁷ The current FTDA applies to dilution by blurring, but does not make dilution by tarnishment actionable (although some courts have read it to include tarnishment). The proposed bill would explicitly make tarnishment actionable as well.

“Tarnishment generally arises when the plaintiff’s trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner’s product.”¹⁸

12 *Scholastic Inc. v. Stouffer*, 124 F.Supp.2d 836 (S.D.N.Y. 2000).

13 *Id.* at 849.

14 *Id.* at 852.

15 *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, fn. 12 (5th Cir. 2000).

16 *Id.*

17 *Id.*

18 *Deere & Company v. MTD Products, Inc.*, 41 F.3d 39, 43 (2d Cir. 1994).

Unfortunately, it also provides trademark holders with another cause of action to silence critics. Additionally, a broad application of tarnishment acts to chill commercial speech.¹⁹ For example, in *Deere v. MTD*, the court found dilution by tarnishment where a competitor showed Deere's trademark, a running deer, fleeing from the competitor's tractor.

What the proposed bill fails to recognize is that trademarks have a huge impact on our shared culture. Trademarks have become essential to the communication about particular goods or services, often representing the most effective means by which to state one's position.²⁰

By coupling the "likelihood of dilution" standard along with tarnishment, trademark holders can now argue their trademark is "likely to be tarnished" and possibly prevail, even though no tarnishment has actually occurred. Furthermore, the trademark holder can obtain an injunction against the speech long before a trial is even held.

If tarnishment remains as a cause of action, the exemptions must make clear that fair use and free speech are fully protected, even if used in commercial speech. Furthermore, the definition of "tarnishment" in Section 2(c)(2)(C) should be changed. Currently, it defines tarnishment as "association between a designation of source and a famous mark, arising from their similarity, that harms the reputation of the famous mark." The definition is too vague and would sweep into it parody and criticism. After all, if the criticism is successful, won't it "harm" the mark? If the parody (in the case of the Joe Chemo "subvertisement" contained in the Appendix) is successful in reducing smoking, isn't it harming the mark? Tarnishment has traditionally been used where the mark is associated with illegal activity or sexual activity.²¹ "Harm" should be more specifically defined to make it clear what kind of harm is contemplated.

The bill inappropriately continues to rely on a distinction between "commercial" and "noncommercial" to determine that only "noncommercial" speech is protected. This strips protection from commercial speech, as well as speech that has only incidental commercial components.

The fact that the communication carries a commercial component should not automatically deprive the communication of First Amendment protection. In many cases, the commercial component is what makes the communication viable. "A social satire is no less effective or communicative if sold than if given away, and the costs of printing and distributing the message. . . can generally be recouped through sales of the item in question."²² Furthermore, as even commercial speech is protected under the First Amendment, it makes little sense to deprive it of protection under the FTDA simply *because* it is commercial.

It is not always easy to determine what is and is not "commercial" speech. The United States Supreme Court has held that commercial speech is "speech proposing a commercial transaction."²³ Within those narrow confines, the

19 The Supreme Court has recognized that commercial speech is entitled to First Amendment protection. See *Va. State Bd. Of Pharmacy v. Va. Citizen's Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

20 See *Meyer v. Grant*, 486 U.S. 414 (1988) (stating that the First Amendment not only protects the right to advocate a cause, but also the right to select the most effective means to do so).

21 Unless the material is found to be "obscene," sexual material is protected under the First Amendment. We therefore do not recommend defining sexual activity that is not obscene as tarnishment.

22 Michael A. Albert and Robert L. Bocchino, Jr., "Trade Libel: Theory and Practice Under the Common Law, The Lanham Act, and the First Amendment," 89 *Trademark Rep.* 826, 883 (1999).

23 *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980), *Bolger v. Youngs Drug Products Corp.* 463 U.S. 60, 66 (1983).

definition may be sufficient. The question of what constitutes commercial speech however is far more nuanced, and bright lines are hard to find. For example, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Court found that a statement of alcohol content on the label of a beer bottle constituted commercial speech. Likewise, the Court found commercial speech in statements on an attorney's letterhead and business cards identifying him as a Certified Public Accountant and Certified Financial Planner.²⁴

In *Bolger*, the United States Supreme Court was faced with a question of whether a federal law prohibiting the mailing of unsolicited advertisement for contraceptives violated the federal Constitution's free speech provision as applied to certain mailings by a corporation that manufactured, sold, and distributed contraceptives. One category of the mailings in question consisted of informational pamphlets discussing the desirability and availability of prophylactics in general or the corporation's products in particular. The Court noted that these pamphlets did not merely propose commercial transactions.²⁵ While the parties conceded the pamphlets were advertisements, the Court did not find that fact alone sufficient to make them commercial speech, because paid advertisements are sometimes used to convey political or other messages unconnected to a product or service or commercial transaction.²⁶ The Court concluded that a combination of three factors, all present in this case, provided strong support for characterizing the pamphlets as commercial speech. The three factors examined by the court were: (1) advertising format; (2) product references; and (3) commercial motivation.

Part of the difficulty in applying *Bolger* is that the Court rejected the notion that any one of the factors was *sufficient* by itself, but also declined to hold all of these factors in combination, or any one of them individually, was *necessary* to support characterizing certain speech as commercial.²⁷ It is no wonder the Supreme Court in later decisions acknowledged that "ambiguities may exist at the margins of the category of commercial speech."²⁸

When given an opportunity to more clearly define commercial speech in *Nike v. Kasky*, the U.S. Supreme Court dismissed the case as having improvidently granted *certiorari*. Several members of the Court specifically noted the difficulty of the questions presented. As a result, lower courts are left to flounder, and often take an overly broad view of what constitutes commercial speech.

Against this backdrop, and despite the fact that the Supreme Court has recognized that commercial speech enjoys First Amendment protection, the FTDA continues to rely upon a supposed bright-line distinction between fully protected and commercial speech, condemning any speech that is not "pure" (meaning it is not tainted with any commercial element).²⁹

Reliance on this supposed "bright-line" distinction ignores the fact that effective speech is rarely "pure" in that it lacks some commercial component. Activist groups routinely seek donations on a web site to support their work,

²⁴ *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. Of Accountancy*, 512 U.S. 136 (1994).

²⁵ *Bolger*, supra. at 62.

²⁶ *Id.*

²⁷ *Id.* at 67, fn. 14, and 66, fn. 13.

²⁸ *Edenfield v. Fane*, 507 U.S. 761, 765 (1993). See also, *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) [recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category"] and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) [stating that "the precise bounds of the category of . . . commercial speech" are "subject to doubt perhaps."].

²⁹ Previous cases have demonstrated that protected speech tainted with magazine sales, *Anheuser-Busch, Inc. v. Balducci Pub.*, 28 F.3d 769, 775 (8th Cir. 1994), or T-shirt sales, *Mutual of Omaha Insurance Co. v. Novak*, 836 F.2d 397, 402 n.8 (8th Cir. 1987), are not deemed "non-commercial" speech by the courts.

sell T-shirts, stickers and books, and possibly even allow advertising on the web site. Yet, under the FTDA, critical websites and parodies that generate incidental revenue could still be found to be “commercial” and therefore subject to an injunction. The result is a chilling of the expressive use of trademarks in speech that mixes traditionally understood free speech with commercial elements.

An example is Adbusters Media Foundation and its magazine, Adbusters. This publication features advertisement parodies, called “subvertisements,” which use trademarks and corporate logos to generate awareness about social and political issues. One issue featured “Joe Chemo,” a parody of the “Joe Camel” character used by Camel cigarettes, to raise awareness of the health issues surrounding smoking.³⁰ These ads represent a type of important civic speech that is traditionally protected under the First Amendment. It makes critical commentary on the trademark holder, furthering the traditional goals of trademark law by informing the consumer about the goods and services they purchase. While the speech is predominantly civic in nature, the commercial element of selling the magazine could well mean that the trademark holder under the FTDA could silence its critical speech.

Although Congress in adopting the FTDA, characterized the noncommercial use exception as adequate to accommodate First Amendment concerns, that assessment has proved to be unduly optimistic. Even courts that reach the right result often have to strain to protect free speech.

When faced with a trademark dilution claim for the parody song “Barbie Girl,” the Ninth Circuit Court of Appeals recognized that the song was entitled to protection under the First Amendment.³¹ It did not, however, fit neatly into the three exceptions noted in the FTDA: It was not comparative advertising, it was being sold for a commercial purpose, and it was not news reporting. In order to reach the correct result and deny the injunction, the court interpreted “noncommercial use” to refer to a use “that consists entirely of noncommercial, or fully constitutionally protected, speech.”³² “If speech is not ‘purely commercial’ – that is, if it does more than propose a commercial transaction – then it is entitled to full First Amendment protection.”³³ While such a result is correct, and comports with the legislative history of the FTDA indicating an intent to protect parodies, this is a somewhat strained definition, and certainly not followed by all courts. As noted above, in *Bozell*, a commercial purpose was found simply because Bozell sought donations over the Internet for his activities. Thus, the noncommercial use exception provides no consistent relief for those who engage in free speech activities.

We recommend amending the exemptions to drop the distinction between “commercial” and “noncommercial” speech and provide an exemption for *any* speech protected by the First Amendment.

Intent or bad faith should be an element of the blurring cause of action.

Section 2(c)(2)(B)(v)

One of the factors in determining dilution by “blurring” is “whether the user of the designation of source intended to create an association with the famous mark.” In a parody, or criticism, the user of the mark obviously intends to create an association with the famous mark. The mere mental association is insufficient to support a blurring cause of action.³⁴ The lack of an element of intent or bad faith would allow blurring to silence parody or criticism based

³⁰ See Appendix for examples.

³¹ *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).

³² *Id.* at 905.

³³ *Id.* at 906.

³⁴ *Moseley*, *supra*. at 433.

merely on the intended association. We recommend that this factor encompass some form of bad faith or intent to harm (being specific about the type of harm contemplated).

Harm should also be incorporated as an element in the blurring cause of action.

Section 2(c)(2)(B)(vi) provides another factor in determining “blurring,” and likewise relies upon association without a concomitant harm. [“Any actual association between the designation of source and the famous mark.”] Once again, a parody or criticism, if successful, would meet this criterion.

We recommend that whatever harm this is intended to prevent be spelled out in more detail to avoid reliance on mere association as a factor in determining harm.

Section 2(c)(4)(B) would sweep in parodies and criticism.

Section 2(c)(4) provides for additional remedies (beyond an injunction) where the acts of the junior mark holder are intentional. Subsection B allows additional remedies in a tarnishment action where “the person against whom the injunction is sought willfully intended to trade on the reputation of the famous mark.” Once again, this is exactly what a parody or criticism does – it trades on the reputation of the famous mark. Thus, speech that should be protected under the First Amendment could be used to justify even more damages than just an injunction.

The fair use exemption should be expanded to encompass all fair uses.

Both the current and the proposed FTDA allow an exception for “fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.” There is no rational basis for limiting fair use in this manner. Fair use is a much broader concept, and it should apply to trademark dilution actions in all situations, not just comparative advertising.

Conclusion

By using trademark dilution as a claim, companies would have an additional potent weapon to silence their critics. Unlike defamation claims, the company need not demonstrate falsity or malice – only the “likelihood of tarnishment.” To the extent any critic is successful, companies may be able to establish that their trademark is “likely to be tarnished.” Preliminary injunctive relief would silence the critics pending trial, even though the company has proven no actual harm to its trademark, and the court has made no final ruling that the critic's speech is unprotected.

As the FTDA expands, it alters the dynamic tension between trademark holders and free speech in favor of trademark holders. While enriching trademark holders, it dilutes free speech without any concomitant benefit to society. Furthermore, it places the trademark holder in the position of holding an indefinite monopoly in expressive subject matter, and obstructs the public's ability to freely engage in a democratic dialogue.³⁵

³⁵ See *Cohen v. California*, 403 U.S. 15, 26 (1971) (recognizing that the elimination of particular words poses a substantial risk of suppressing ideas in the process).

App. 1

APPENDIX



App. 2

